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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

-against-

POWER VENTURES, INC. d/b/a POWER.COM, a
California corporation; POWER VENTURES, INC.
a Cayman Island Corporation, STEVE VACHANI,
an individual; DOE 1, d/b/a POWER.COM, an
individual and/or business entity of unknown nature;
DOES 2 through 25, inclusive, individuals and/or
business entities of unknown nature,

Defendants.

Case No. 5:08-CV-05780 JW

**DEFENDANT POWER VENTURES,
INC.'S OPPOSITION TO
FACEBOOK, INC.'S MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS AND DISCOVERY
RESPONSES**

Date: October 24, 2011
Time: 9:00 a.m.
Courtroom 15, 18th Floor
Judge James Ware

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1 **I. INTRODUCTION**

2 After doing virtually nothing in this case for six months, Facebook has filed three motions
3 to compel since August 10. This motion, however, has severe deficiencies. *First*, Facebook
4 already has the bulk of the information sought by this motion. Power has already produced its
5 voluminous source code as well as numerous other documents regarding how Power functions.
6 *See* 8/31/11 Joint Stipulation, Dkt. No. 134, at 1. Moreover, on July 20, Facebook deposed
7 Power's sole employee and CEO, Steve Vachani, and Mr. Vachani testified at length about the how
8 Power accessed Facebook's website.

9 *Second*, the documents Facebook seeks are largely irrelevant to Facebook's remaining
10 claims. Specifically, in this motion, Facebook seeks technical and financial documents, but none
11 of those documents establish any of the elements of Facebook's claims or that it was damaged in
12 any way by Power's actions.

13 *Finally*, the motion is untimely. By the time the Court considers this motion, it will have
14 been over a year since Facebook propounded its discovery requests and more than ten months since
15 Power served its responses. Facebook makes no effort to explain why it has taken so long to raise
16 these issues with Power and the Court. The Court should deny Facebook's motion to compel.

17 **II. ARGUMENT**

18 **A. Power Has Already Produced the Documents and Information**
19 **Facebook Seeks**

20 In its motion, Facebook asks the Court to order defendants to provide information regarding
21 (a) the technical means by which Power accessed Facebook's website, (b) technical information on
22 Power's proxy servers, including a list of exact IP addresses, and (c) Power's financial statements.
23 Facebook's Motion to Compel at 1, 5-6, 8-10. Facebook, however, fails to tell the Court that it
24 already possesses the bulk of this information.

25 *First*, Facebook seeks information regarding the technical means by which Power accessed
26 Facebook's website. Power has already produced its source code, the core of its business. The
27 source code as well as the other documents Power has produced in this case, such as the
28 PowerScript Training documents and PowerScript Documentation Developer Manual, show

1 precisely how Power accessed Facebook's website. Those documents constitute the best possible
2 information Power has to understand how it accessed Facebook's website. Declaration of Steve
3 Vachani at ¶2. In fact, Facebook's expert Lawrence Melling has spent more than seven full days
4 examining Power's source code beginning on August 23, 2011. Declaration of L. Timothy Fisher
5 at ¶ 2. Power also provided more than 1700 pages of the code to Facebook and its expert for their
6 review pursuant to Section 8(d) of the Protective Order on September 14, 2011.¹ *Id.* at ¶ 3.
7 Moreover, during his deposition, Mr. Vachani testified at length about the process by which Power
8 accessed Facebook's website. Declaration of Steve Vachani at ¶ 3. Facebook already has detailed,
9 technical information regarding Power and should not be required to produce additional duplicative
10 information.

11 In addition, Facebook already has uncontroverted evidence that Power accessed its website
12 through proxy servers. Therefore, it is unnecessary for Power to produce additional technical
13 information, such as a list of its IP addresses, and Facebook makes no effort to explain why it is
14 necessary for it to have the actual IP addresses and how that information is relevant to its claims.
15 In its motion, Facebook demonstrates its familiarity with Power's proxy system. Facebook writes
16 that "Power employs 'hundreds maybe even more IP addresses,' including IP addresses associated
17 with proxy servers which were used to run the power.com website and which were used even when
18 Facebook sought to block Power." Facebook's Motion to Compel at 13 (citing Cooper Decl. Ex. 1,
19 at 107:4-12; 330:1-331:14). Referring to Mr. Vachani's deposition, Facebook writes, "Vachani has
20 fully admitted that the company employed a large range of IP addresses to communicate with the
21 Facebook website . . . Power continued to access the Facebook website by using a 'bank' of IP
22 addresses associated with proxy servers" *Id.* at 2. Facebook can establish that Power
23 accessed its website through its proxy servers. These facts are uncontested, and Facebook
24 demonstrates that it is already familiar with the facts. It is unnecessary for Power to produce
25 additional documents on these issues.

26
27 ¹ The 1700 pages of the source code provided by Power to Facebook pursuant to Section 8(d)
28 of the Protective Order are merely the excerpts of the code requested by Facebook's expert. The
complete source code is far more voluminous.

1 Finally, Facebook also seeks Power's financial information, but makes no effort to explain
 2 how that information is remotely relevant to its remaining claims in this case. Moreover, Mr.
 3 Vachani already gave detailed testimony regarding the financial state of his company. During his
 4 deposition, Mr. Vachani explained that Power is no longer operational and acknowledged that he is
 5 its sole employee. *See* Facebook's Second Motion to Compel, Dkt. No. 129, at 5.

6 Additionally, Mr. Vachani specifically described the portion of Power's revenues it
 7 received from Facebook operations. Mr. Vachani testified that "well over 90 percent of our users
 8 were Orkut users." *See* Power's Opposition to Facebook's Second Motion to Compel, Dkt. No.
 9 136, at 8. In addition, "probably 99 percent of [2008 revenue] was generated from Orkut." *Id.* A
 10 possible reason for these numbers is that the vast majority of Power's users were from India and
 11 Brazil. As Mr. Vachani indicated, "[W]e knew that over 90 percent or more [of our users] were
 12 coming from India and Brazil." *Id.* at 9. Furthermore, Facebook operations provided almost no
 13 revenue to Power. In 2008, Power only received \$1,000 to \$2,000 from Facebook, "and that's
 14 probably overestimating of total revenues that might have been generated from Facebook because
 15 it was such a small amount." *Id.* This is the exact information Facebook seeks in its motion to
 16 compel: "Power's profits and advertising revenue generated in conjunction with its unauthorized
 17 access of Facebook's website." Facebook's Motion to Compel at 1.

18 Facebook already possesses much of the information it seeks in this motion to compel.
 19 Facebook has Power's source code and the deposition testimony of Power's sole employee and
 20 CEO. These sources reveal the manner in which Power accessed Facebook, how Power accessed
 21 Facebook's proxy servers, the financial state of Power, and the portion of revenues Power derived
 22 from Facebook operations. The Court should not require Power to produce any additional
 23 information.

24 **B. The Documents and Information Facebook Requests Are**
 25 **Irrelevant Because They Are Completely Unrelated to**
 26 **Facebook's Remaining Claims**

27 Facebook's three remaining claims in this case are for alleged violations of the CAN-
 28 SPAM Act, Computer Fraud and Abuse Act, and California Penal Code § 502. *See* Dkt. No. 98 at

1 1. The documents and information sought by Facebook, however, are largely irrelevant to its
 2 remaining claims.²

3 *First*, under the CAN-SPAM Act, Facebook alleges that Power initiated an email with false
 4 and misleading header information, a misleading “from” line, and a non-functioning return address.
 5 *See* Facebook’s First Amended Complaint, Dkt. No. 9, at 15-16. It is undisputed, however, that
 6 Facebook – not Power – initiated these messages and that the email headers were accurate. *See*
 7 Defendants’ Motion for Summary Judgment, Dkt. No. 98, at 5-9, 12-14 (citing to the deposition of
 8 Facebook’s litigation counsel Craig Clark in which Mr. Clark admitted that he was not aware of
 9 any instance where an email from an outside source was transmitted to a Facebook user’s account
 10 and that only Facebook or a Facebook user can transmit email messages to Facebook accounts).
 11 Furthermore, the documents and information sought by Facebook are completely unrelated to
 12 whether Facebook suffered any damages due to these messages, which it did not. *See id.* at 10-11
 13 (citing to testimony of Craig Clark in which Mr. Clark admitted that Facebook has no evidence that
 14 it suffered any damage or loss). Therefore, the information sought by Facebook’s discovery
 15 requests is entirely irrelevant to Facebook’s CAN-SPAM Act claim.

16 *Second*, the information sought by Facebook is also irrelevant to its claim under the
 17 Computer Fraud and Abuse Act (“CFAA”). In that cause of action, Facebook alleges that Power
 18 accessed Facebook’s systems in an unauthorized manner. *See* Facebook’s First Amended
 19 Complaint, Dkt. No. 9, at 17-18. However, a CFAA claim requires proof of the intent to defraud
 20 and the taking of something of value. *See* 18 U.S.C. § 1030(a)(4). The documents and information
 21 sought by Facebook have nothing to do with either aspect of the CFAA claim. In fact, it is
 22 undisputed that Power had no intent to defraud and that Power did not take anything of value from
 23 Facebook’s servers. *See* Defendants’ Motion for Summary Judgment, Dkt. No. 98, at 16-19.
 24 Moreover, the information sought by Facebook is technical in nature and is not remotely probative
 25 of intent, nor could it possibly establish whether Power took anything of value from Facebook.

26
 27 ² At the time Facebook served the document requests and interrogatories at issue, it asserted
 28 eight claims against defendants. In February, 2011, however, Facebook voluntarily dismissed five
 of its claims. *See* 2/18/11 Stipulation of Dismissal, Dkt. No. 97.

1 *Third*, to establish its claim under California Penal Code § 502, Facebook must demonstrate
 2 that Power accessed Facebook’s servers “without permission” and that Facebook suffered damages
 3 as a result. California Penal Code § 502(c)(1)-(4) and (7). This Court already ruled that, “Power
 4 did not act ‘without permission’ within the meaning of Section 502 when Facebook account
 5 holders utilized the Power website . . .” *See* 7/20/10 Order, Dkt. No. 89, at 18. Nevertheless, the
 6 Court held open the possibility that Facebook could establish that Power acted “without
 7 permission” by providing its users with tools “designed to circumvent the technical barriers that
 8 Facebook put in place to block Power’s access to the Facebook website.” *Id.* at 19. But Facebook
 9 already has information regarding how Power accessed its website. Power has produced its source
 10 code, and Facebook questioned Mr. Vachani regarding these technical issues at his July 20, 2011
 11 deposition. In fact, during his deposition, Mr. Vachani testified at length about the process by
 12 which Power accessed Facebook’s website. Vachani Decl. ¶ 3. Mr. Vachani also explained in his
 13 declaration in support of Power’s summary judgment motion that Power had multiple servers with
 14 multiple IP addresses, and that Facebook only blocked one outdated IP. *See* Exh. 1 to the 9/7/11
 15 Declaration of Monte Cooper, Dkt. No. 140, at 327:9-16 (“Power.com has hundreds of IP
 16 addresses . . . ”); *see also* 5/9/11 Declaration of Steve Vachani in Support of Defendants’ Motion
 17 for Summary Judgment, Dkt. No. 98-2, at ¶¶ 11-12. The block was “partial, incomplete, and
 18 ineffective,” and Power made no special efforts to bypass this IP block. 5/9/11 Declaration of
 19 Steve Vachani in Support of Defendants’ Motion for Summary Judgment, Dkt. No. 98-2, at ¶¶ 11-
 20 12.

21 In addition to their inability to prove that Power acted “without permission,” Facebook has
 22 no evidence of any damages suffered as a result of Power’s actions. In fact, this Court found that
 23 any evidence of damages “is likely to be in Facebook’s possession and not Power’s” *See* 7/20/10
 24 Order, Dkt. No. 89, at 7-8. Facebook’s current requests are immaterial to their §502 claim and
 25 involve issues Facebook has already explored in detail.
 26
 27
 28

C. **Facebook Has Waived Its Right To Compel Production Of Documents Because Its Motion Is Untimely**

Motions to compel production of documents must be timely. When the motion is untimely, “Failure to timely file a motion to compel will be construed as a waiver” *Johnson v. Dovey*, 2011 WL 802035, at *6 (E.D. Cal. Feb. 11, 2011).

It is within the Court’s “broad discretion” to determine the timeliness of a motion to compel document production. *Aristocrat Tech. v. Int’l Game Tech.*, 2009 WL 3573327, at *1 (N.D. Cal. Oct. 30, 2009) (stating that in the context of deciding motions to compel, district courts have “broad discretion” over discovery matters). This is a fact-intensive inquiry. *See, e.g., Murata Mfg. Co. v. Bel Fuse, Inc.*, 242 F.R.D. 470, 475 (N.D. Ill. 2007) (“[The timeliness of motions to compel] must necessarily be found in the entire complex of circumstances that gave rise to the motion, and what is untimely in one case may not be in another.”). Motions brought months after the initial discovery request are often untimely. *See, e.g., Haviland v. Catholic Health Initiatives-Iowa Corp.*, 692 F. Supp.2d 1040, 1044-45 (S.D. Iowa 2010) (finding a motion untimely where fifteen months lapsed between the initial production of documents and the filing of a motion); *Ridge Chrysler Jeep L.L.C. v. Daimler Chrysler Services North America, L.L.C.*, 2004 WL 3021842, at *4 (N.D. Ill. Dec. 30, 2004) (finding a motion untimely where it was brought near the end of discovery, and the parties failed to make “a good faith effort to resolve discovery disputes before filing a motion to compel”); *Everett v. Aldi, Inc.*, 2009 WL 940379, at *2 (N.D. Ind. Apr. 6, 2009) (finding a motion untimely where the moving party provided “no new explanations for the delay, simply citing a litany of ongoing problems with communication and cooperation . . .”).

District courts consider several guidelines to make their determination, such as “(i) how long was the delay; (ii) was there an explanation for it; and (iii) what happened during the delay.” *Everett*, 2009 WL 940379, at *2. Applying these guidelines, Facebook’s motion is untimely. By the time this motion is heard by the Court on October 24, it will have been an entire year since Facebook served its interrogatories and document requests on Power on October 22, 2010 and more than ten months since Power responded on December 15, 2010. Facebook has also failed to offer any explanation for the delay in raising these issues with the Court. In fact, Facebook did not

even begin to meet and confer with Power about the responses until six months after Power served its responses and waited almost another four months to file its motion to compel.

Ultimately, Facebook has waived its right to relief and cannot explain why it needed over half a year to determine that it was unsatisfied with Power's original responses.

III. CONCLUSION

For the reasons set forth above, defendant Power respectfully requests that the Court deny Facebook's motion to compel.

Dated: September 21, 2011

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By /s/
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